No. 15,091

United States Court of Appeals

For the Ninth Circuit

PACIFIC-ATLANTIC STEAMSHIP COMPANY, a corporation,

Appellant,

vs.

EMMA HUTCHISON, Administratrix of the Estate of Nathanael Patrick Hutchison, deceased,

Appellee.

APPELLANT'S REPLY BRIEF.

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FOREWORD.

It is impossible, in twenty pages, to distinguish inapplicable cases cited or to fairly and adequately discuss the inaccuracies and misrepresentations of the testimony and evidence contained in the appellee's brief. Appellant's statement of the case (O.B., pp. 6-45) is *accurate* and uses the language of the witnesses, gives *accurate* descriptions of the photographs and sets forth the *exact* language of the documentary evidence. Appellant's *contentions* are as *it* states them. Therefore, the Court is requested to rely solely upon the record in ascertaining the facts and to ascertain the contentions of appellant from *its* statement thereof.

I.

THE CASE OF CORTES v. BALTIMORE INSULAR LINE, 287 U.S. 367, DOES NOT SUPPORT THE APPELLEE'S CONTENTIONS WITH RESPECT TO PARAGRAPH IX OF THE COMPLAINT.

> "We are to determine whether death resulting from the negligent omission to furnish care or cure is death from *personal injury* within the meaning of the statute." (287 U.S. 367, 372, 77 L. ed. 368, 371.)

There are no averments in the amended complaint in the instant cause that the master of the S. S. "Linfield Victory" had the slightest knowledge, *before* Hutchison died, that he had suffered any personal injury whatever, or that he negligently failed to provide medical or surgical care or that as a proximate result thereof Hutchison died. To the contrary, the "second cause of action" avers that "as a result of *said* injuries" [those referred to in paragraph VIII] (T.R., pp. 6-7) he died.

In the *Cortes* case no question of law, disputed or otherwise was raised or discussed or even mentioned in the opinion in respect of the proposition that the aggravation of an existing illness is not a personal injury suffered *in the course of the employment.* It is true that "the act for the protection of railroad employees does not define *negligence*"; (287 U.S. 367, 377, 77 L. ed. 368, 374) but it *does* state that *the* negligence for which there is liability is that "of any of the officers, agents or employees of *such carrier*" (Title 45 U.S.C. § 51); and it also states that *the* surviving widow for whose benefit the right of action is *conferred* is "the surviving widow . . . of *such* employee." (Title 45 U.S.C. § 51.) "*Such* employee" is "any person suffering injury while he is employed" (by

a *common carrier* engaged in interstate or foreign commerce) "in *such* commerce." (id.) The Supreme Court did not discuss any of these propositions in the *Cortes* opinion. It is, therefore, not authoritative precedent in respect thereof. (*Pacific S.S. Co. v. Peterson,* 278 U.S. 130, 136; 73 L. ed. 220, 223; 13 Cal. Jur. 2d pp. 662-663, § 129.)

II.

THE "SECOND CAUSE OF ACTION" DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION OR AVERMENTS SHOWING THAT THE PLEADER IS ENTITLED TO RELIEF.

Appellant contends: No statute creating a right of action for damages by reason of death is *valid* unless it *specifies who* is liable, the *person or persons* for *whose* benefit the action may be maintained and the *grounds of liability.* The *language* of the Jones Act contains *none* of those essentials. (Title 46 U.S.C. § 688.) It does *incorporate,* in their *entirety,* "all statutes of the United States *conferring or regulating* the *right of action* for death in the case of *railway employees* . . ."

The appellee contends in her reply brief that the Congress intended to differentiate and discriminate between the surviving widow of a deceased railway employee and that of a deceased seaman, in that the seaman's widow is *not* required to aver or prove what the incorporated statute requires of the widow of the deceased railway employee.

Appellant prints the statutes as follows:*

"Any seaman who shall suffer personal injury *in the course of his employment* may, at his election, maintain an action for damages at law, with the right of trial by jury, and in *such* action *all* statutes of the United States *modifying or extending* the *common-law* right or remedy in cases of *personal injury* to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in *such* action *all* statutes of the United States *conferring* or *regulating* the *right of action* for *death* in the case of *railway* employees *shall* be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." (Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007; Title 46, U.S.C. § 688.)

"Every *common carrier* [by railroad] while *engaging* in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to *any* person suffering injury *while* he *is* employed by *such* carrier in *such* commerce, or, in case of the death of *such* employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of *such*

*The words of the F.E.L.A. which cannot be applicable to an action for damages by reason of the death of a seaman not employed by a common carrier *by railroad* are placed within brackets. All emphasis is added throughout.

employee; and, if none, then of *such* employee's parents; and, if none, then of the next of kin dependent upon *such* employee, for *such* injury or *death* resulting in whole or in part from the negligence of any of the officers, agents or employees of *such carrier,* or by reason of any defect or insufficiency, due to *its* negligence, in *its* [cars, engines,] appliances, machinery, [track, roadbed,] works, boats, wharves, or other equipment.

"*Any* employee of a *carrier,* any part of whose duties as *such* employee shall be the furtherance of *interstate or foreign commerce;* or shall, in any way *directly* or *closely and substantially,* affect *such* commerce as above set forth shall, for the purposes of this chapter, be considered as *being* employed by *such* carrier in *such* commerce and shall be considered as entitled to the benefits of this chapter." (Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404; Title 45, U.S.C. § 51.)

"In all actions hereafter brought against any *such common carrier* [by railroad] under or by virtue of any of the provisions of *this* chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no *such* employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such *common carrier* of any *statute* enacted for the safety of employees contributed to the injury or death of *such* employee." (Apr. 22, 1908, c. 149, § 3, 35 Stat. 66; Title 45, U.S.C. § 53.)

"The term 'common carrier' as used in this chapter shall *include* the receiver or receivers or *other persons or corporations* charged with the duty of the *management and operation* of the *business* of a *common carrier.*" (Apr. 22, 1908, c. 149, § 7, 35 Stat. 66; Title 45, U.S.C. § 57.)

"Any *right of action* given by *this* chapter to *a person suffering injury* shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of *such* employee, and, if none, then of *such* employee's parents; and, if none, then of the next of kin dependent upon *such* employee, but in such cases there shall be only one recovery for the same injury." (Apr. 22, 1908, c. 149, § 9, as added Apr. 5, 1910, c. 143, § 2, 36 Stat. 291; Title 45, U.S.C. § 59.)

In the "Statement of the managers on the part of The House", 66th Congress, 2d Session, House of Representatives, Report No. 1093, June 2, 1920 (*three* days before the Jones Act was enacted as part of The Merchant Marine Act of 1920), at page 35, the following appears: "Amendment No. 139. This amendment amends section 20 of the seamen's act so as to *extend* the *Federal Employers' Liability Act* to cases of personal injury to or *death of seamen.* . . ."

The appellant contends that it has an *absolute* right, pursuant to Article I, sections 1 and 8, clause 3, Article VI, clause 2, Amendment V and Amendment X, Constitution of the United States, to have its rights, liability and defenses determined in accordance with the plain and unambiguous language deliberately chosen and used by the Congress in enacting the foregoing statutes; that the

unjustified deletion or ignoring of any word or other part thereof would be in direct contravention of said right; and also in contravention of the guarantee of "due process of law" as set forth in Amendment V. These Constitutional provisions read as follows:

> "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Art. I, Sec. 1.)
>
> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes;" (Art. I, Sec. 8, cl. 3.)
>
> "This Constitution and the *Laws of the United States* which shall be *made* in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land; . . .*" (Art. VI, cl. 2.)
>
> "No person shall be . . . deprived of property, without due process of law; . . ." (Amendment V.)
>
> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." (Amendment X.)

If this Court is of the opinion that any of the language actually used by the Congress in chapter 2 of the Federal Employers' Liability Act and which is literally applicable to an action for damages by reason of the death of a seaman is *not* controlling, appellant respectfully insists that its *constitutional* rights require and entitle it to a *forthright and direct* decision *quoting* the parts which are to be deleted by judicial construction. This task will not be

simple, and it cannot be accomplished by a *nebulous* observation, which decides and declares *nothing* specific, that "the Federal Employers' Liability Act does not furnish a rigid pattern for all rights of a seaman's widow." The disputed question of law is this: What, if any, *specific* parts of said F.E.L.A. do *not* apply? Appellant contends that the *only* words in the F.E.L.A. which may be deleted are the following: "by railroad"; "cars, engines"; and "track, roadbed"; and that *all* of the remaining language constitutes the sole and exclusive basis of the *right of action* referred to in the Jones Act. In all other respects the applicable rules are as follows:

> "It is fundamental that the province of *construction* of statutes lies *wholly* within the domain of *ambiguity.* The rules of construction are an aid to resolve doubts and not to create them." (*Santa Monica, etc. v. U.S.,* 99 F. 2d 450, 455.)
>
> "The courts must confine themselves to the construction of the law as it is, and not attempt to *amend* or *change* the law under the guise of construction. (82 C.J.S. pp. 530-532, § 312.)
>
> "* * * our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain—neither to *add* to nor to *subtract,* neither to *delete* nor to *distort.*" (62 *Cases of Jam v. U.S.,* 340 U.S. 593, 596, 95 L. ed. 566, 570.)
>
> "There is a presumption that every word, sentence or provision was intended for some useful purpose, has some force and effect, and that some effect is to be given to each, and also that no superfluous words or provisions were used. Conversely, it will not be presumed that the legislature inserted idle or mean-

ingless verbiage, or superfluous language, or intended any part or provision to be meaningless, redundant or useless." (82 C.J.S., pp. 551-552, § 316.)

"Where the *language* of a statute is *plain and unambiguous,* there is no occasion for *construction,* . . . An unambiguous statute must be given effect according to its plain and obvious meaning, and such unambiguous statute cannot be extended beyond its plain and obvious meaning, or confined in operation within narrower limits or bounds than manifestly intended by the legislature, because of some supposed policy of the law, or because the legislature did not use proper words to express its meaning, otherwise the court would be assuming legislative authority. In construing a statute expressed in reasonably clear language the court should neither read in nor read out; and where a law is plain, unambiguous, and explicit in its terms, the exceptions are few indeed that authorize a court to read something into it that the law writers did not themselves put therein." (82 C.J.S. pp. 577, 582, 583, 587, 588, § 322.)

It is *indispensable* that a complaint must state *facts* which show a cause of action under the statute involved in order to invoke the benefit thereof. (82 C.J.S. 1021, § 443; and cases cited in appellant's opening brief, pp. 3-5.)

The appellee has argued her contentions upon the fallacy that the Federal Employers' Liability Act is *not* a part of the Jones Act. The language used by the Congress is unambiguous. In respect of a *deceased* seaman, the personal representative has two possible rights of action, pursuant to Title 45 U.S.C. §§ 51, 59, incorporated by reference thereto in the Jones Act.

(1) The *survival* of the living seaman's right to recover damage by reason of conscious pain and suffering can be found nowhere excepting in section 59. The *statute* states in unambiguous language that "any *right of action* given by *this* chapter to *a person suffering personal injury* shall survive to his or her personal representative." The *only* right of action *given* by chapter 2 of the F.E.L.A. to "a person suffering personal injury" is that *created* against common carriers [by railroad] while engaging in interstate or foreign commerce; and such right is "given" only "to any person suffering injury *while* he *is* employed by *such* carrier in *such* commerce" in the event *such* injury is one "resulting in whole or in part from the negligence of any of the officers, agents, or employees of *such* carrier, or by reason of any defect or insufficiency due to *its* (such carrier's) negligence, in *its* (such carrier's) cars, engines, *appliances, machinery,* track, roadbed, *works, boats, wharves,* or *other equipment.*" (Title 45, U.S.C. § 51.) The last paragraph of this section is a statutory definition of what is included within and meant by the phrase "employed by such carrier in such commerce."

(2) The statutory right of action in respect of a seaman who dies as a result of personal injury suffered in the course of his employment is *not* a survival of *any* right or remedy which might have been available to a living seaman pursuant to any statute or the unseaworthiness doctrine of liability regardless of negligence. The "*rights and remedies* are those possessed by *railway employees and their personal representatives* under the laws of the United States. (*Panama R.R. v. Johnson,* 264 U.S.

375, 44 S. Ct. 391, 68 L. ed. 748.) As this action was brought by the personal representative to recover damage for the death of the seaman, the rights of the parties depend upon the statute." (*Kunchman v. U.S.*, 54 F. 2d 987, 989.) The "second cause of action" (T.R., pp. 7-8) does not involve *any* right of action given to a *seaman,* as such, or otherwise. It is not for his benefit. It is for the benefit of the surviving widow" etc. (Title 45, U.S.C. §51; *Van Beeck v. Sabine Towing Co.,* 300 U.S. 342, 346-347, 81 L. ed. 685, 688.) The *statute* provides the right of action "for the benefit of the surviving widow . . . of *such* employee." All we have to do is to read the preceding provisions of the statute to ascertain *who* is referred to as the antecedent of the plain words "*such* employee". The first place we find the same words is in the phrase "in case of the *death* of *such* employee". Going back a little further we find the antecedent of the words "such employee". It is "*any* person suffering injury *while* he *is* employed by *such* carrier in *such* commerce." The antecedent of the phrase "by such carrier in such commerce" is the language "Every *common carrier* by railroad *while engaging in*" interstate or foreign commerce. The foregoing analysis is on obviously sound ground and specifies the status and relationship of the parties upon whom liability is imposed and those for whose benefit the statutory right of action is conferred.

We now proceed to a consideration of the sole *factual* bases of negligence as provided for by the Congress. There is liability in damages "for death resulting in whole or in part from the negligence of any of the officers, agents, or employees of *such* carrier, or by reason of any

defect or insufficiency, due to *its* (such carrier's) negligence, in *its* (such carrier's) cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." Thus the "common-carrier-engaging in interstate or foreign commerce" requisite is carried by direct and plain language into the factual bases of liability in respect of negligence.

It is an obvious certainty that the *language* of the Jones Act, all by itself, does not create a cause of action for damages by reason of the death of any seaman. It needs the statutes of the United States "conferring or regulating the right of action for death in the case of railway employees" and plainly states that *all* such statutes "*shall* be applicable." (Title 46, U.S.C. § 688.)

There is not a single ambiguity of any kind or character in any of the sections of chapter 2, F.E.L.A. (§§ 51-59.) Therefore, the intention of the Congress is to be ascertained from the language it chose to deliberately express its intent. The Congress knew when it enacted the Jones Act that the constitutionality of the F.E.L.A. had been sustained upon the *sole* ground that it was within its legislative power to regulate interstate and foreign commerce. (*Mondou v. N.Y., N.H. & H. R. Co.,* 223 U.S. 1, pp. 46-49, 56 L. ed. 327, pp. 344-350.)

In *Lindgren v. U. S.,* 281 U.S. 38, 74 L. ed. 686, the Court held that the "wrongful death" statute of Virginia was not applicable to the death of a seaman within the territorial waters of said state because the Congress, in the exercise of its power to regulate interstate commerce, by *incorporating* the *Federal Employers' Liability Act*

in the Jones Act, had occupied a field which was thereby *withdrawn* from the legislative power of the state.

The Court said: *"The Federal Employers' Liability Act,* which was *incorporated* in the Merchant Marine Act by reference, related to the liability of *common carriers* by railroad to their employees *in* interstate and other commerce, as *specified."* (281 U.S. 38, 40; 74 L. ed. 686, 689.) "By the Merchant Marine Act, however, the prior maritime law was modified by giving to personal representatives of seamen whose death had resulted from personal injuries, the right to maintain an action for damages *in accordance* with *the provisions* of the *Federal Employers' Liability Act."* (281 U.S. 38, 44; 74 L. ed. 686, 691.) "These decisions are in accordance with the long-settled rule that since Congress by the Federal Employers' Liability Act took possession of the *field* of the employers' liability to employees *in interstate transportation* by rail, all state laws on the subject are superseded. . . . In the light of the *foregoing* decisions and in *accordance* with the principles *therein* announced we conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and *incorporating* in *that* law the *provisions* of the *Federal Employers' Liability Act—establishes* as a modification of the prior maritime law *a rule of general application* in reference to the *liability of the owners of vessels* for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the states and *is as comprehensive* of *those* instances in which by *reference* to the *Federal Employers' Liability Act* it *excludes* liability, as of *those* (instances) in which liability *is* imposed; and that, as it covers the entire

> field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject matter." (281 U.S. 38, 45, 46, 47; 74 L. ed. 686, 692, 693.)

Thus, there can be no escape from the basic proposition that the Federal Employers' Liability Act is the life and vitality of the Jones Act; and that the "second cause of action" is fatally defective. (This is *not* a recent contention of appellant. It was fully and fairly exposed and raised in appellant's written motion to dismiss the amended complaint *before* it filed its answer thereto; as this Court may see from looking at said motion which is a part of the trial court file now in the file of this Court, although not printed in the Transcript of Record.)

III.

THERE IS NO DIRECT OR INDIRECT EVIDENCE IN THE RECORD WHICH IS SUFFICIENT TO SUPPORT THE VERDICT AND JUDGMENT ON THE "SECOND CAUSE OF ACTION".

No jury can draw inferences excepting those reasonably deducible from direct or indirect *evidence.*

The appellee does not, in her reply brief, point to *any* evidence from which the jury *could* infer that (1) Hutchison was not fully cognizant of the ventilator shaft, the pipe railings surrounding it and the access shaft in which the ladder was located; or (2) that the degree of visibility *actually* present within masthouse number 2 on *April 24, 1951,* was insufficient to enable Hutchison to clearly see everything therein. She declines to discuss or write *any-*

thing on those vital subjects. (*Foster v. Moore-McCormack Lines, Inc.,* 131 F. 2d 996; *Lahde v. Soc. Armadora Del Norte,* 220 F. 2d 357 [please see the *actual* allegations of the amended libel in rem, pp. 30-35, T.R. No. 14155]; *Crawford v. Pope & Talbot, Inc.,* 206 F. 2d 784; *Read v. U.S.,* 201 F. 2d 758; and *The Wearpool,* 112 F. 2d 245.) Appellee has cited *no* decision where any judgment has been affirmed in any case where a seaman *or* longshoreman has fallen or gotten into a hatch or shaft surrounded by either a rope, chain or pipe railings; or even into an *open* hatch or shaft when he *knew* it was there and no *evidence* of insufficient visibility at the precise time of the fall appeared in the record.

Appellee tries to rescue or vitalize Amundsen's and Crawford's testimony as to screens, etc., by pointing to the photographs (A.B., pp. 20-21.) Amundsen *testified* that he had never seen any other ventilator shaft without a ladder going down it, (T.R., p. 143) thereby demonstrating that he had never been on any Victory ship other than the "Linfield Victory". Crawford had been on only *five* of the *several hundred* Victory ships built during the war and had not even been in the masthouses of each one of those five. (T.R., pp. 235-236.)

CONCLUSION.

There are other matters referred to in Appellee's Brief which appellant can answer but the 20 page limit will not permit it to do so. It is respectfully requested that appellant be given a reasonably sufficient extra time allowance at the forthcoming oral argument to do so.

Dated, San Francisco, California,
December 5, 1956.

Respectfully submitted,
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